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In the Supreme Court of the United States

OCTOBER TERM, 1991

INDUSTRIAL HELICOPTERS, INC.
Defendant-Petitioner

VERSUS

MICHAEL J. GREEN
Plaintiff-Respondent

UNITED STATES FIDELITY & GUARANTY COMPANY
Plaintiff-intervenor/ Respondent

PETITION FOR WRIT OF CERTIORARI TO THE LOUISIANA SUPREME COURT

APPENDIX VOLUME I

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APPENDIX A

Jan 17 1992

No. 91-C-0859 c/w 91-C-0860

Michael J. Green, United States Fidelity & Guaranty Co.

Versus

Industrial Helicopters, Inc.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEAL THIRD CIRCUIT
Parish of Lafayette, State of Louisiana

CALOGERO, Chief Justice.

The narrow question presented in this case is whether Louisiana Civil Code article 2317[1], which imposes strict liability for injury causing things in one's custody, is applicable in a case cognizable in admiralty but brought in a Louisiana state court pursuant to the "savings to suitors" clause of the Judiciary Act of 1789 as amended.

Originally, the court of appeal held that plaintiff could recover under La. C.C. art. 2317 for an injury in a helicopter crash at sea. *Green v. Industrial Helicopters, Inc.*, 560 So. 2d 684 (La. App. 3d Cir. 1990). We granted writs and remanded to the third circuit court of appeal to determine whether the decision was in conflict with another out of the same circuit, *Duhon v. Petroleum Helicopters, Inc.*, 554 So. 2d 1270 (La. App. 3 Cir. 1989),

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[1] La. C.C. art. 2317 states:

> We are responsible, not only for the damage occasioned by our own act, but for that which is caused by the act of persons for whom we are answerable, or of the things which we have in our custody.

writ denied, 559 So. 2d 1360 (La. 1990), and if so, to determine which decision is correct. Upon remand, the court of appeal found its original decision,[2] that recovery was available under Article 2317, inconsistent with *Duhon*, supra, and that *Duhon* was correct. *Green v. Industrial Helicopters, Inc.*, 576 So. 2d 1183 (La. App. 3d Cir. 1991). We granted writs once more to examine that determination.

For the reasons which follow we reverse the court of appeal and hold that Article 2317 applies as a supplement to the remedies available under the general maritime law in this maritime personal injury case, since Article 2317 does not impermissibly conflict with the substantive general maritime law.

Plaintiff, Michael J. Green was employed as an offshore oil meter technician for Southern Petroleum Labs ("Southern"). Southern contracted with Industrial Helicopters, Inc. ("Industrial") to carry workers from Louisiana shore sites to offshore platforms. Doug Wright was employed by Industrial as a helicopter pilot. There occurred an emergency helicopter landing on the high seas approximately 150 miles off the Louisiana coast. Plaintiff's lawsuit, filed in the Fifteenth Judicial District Court, State of Louisiana, named as defendants the pilot of the aircraft, Wright, and the pilot's employer, Industrial.

Wright picked up the plaintiff in Milton, Louisiana. From there plaintiff was to be taken to his worksite in the Gulf of Mexico from which he was later to be returned to Milton. En route to the worksite, the pilot refueled at an Exxon platform located 140 miles off the coast of the State

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[2] 560 So. 2d 684 (La. App. 3 Cir. 1990).

of Louisiana. After refueling and soon after taking off from the Exxon platform, mechanical failure caused the pilot to make an emergency landing in the Gulf. The helicopter's governor had malfunctioned. Workers on the nearby Exxon platform assisted in the rescue of plaintiff and the pilot. Plaintiff suffered injuries in the emergency landing and in the rescue.

Generally, federal maritime jurisdiction is invoked whenever an accident occurs on the high seas and in furtherance of an activity bearing a significant relationship to a traditional maritime activity. *Offshore Logistics v. Tallentire,* 477 U.S. 207, 106 S. Ct. 2485 (1986); *Executive Jet Aviation, Inc. v. City of Cleveland,* 409 U.S. 249, 93 S. Ct. 493 (1972). The United States Supreme Court has stated that although a helicopter is not a "traditional maritime conveyance," when it is used to ferry passengers from an island to the shore or vice versa it is engaged in a function traditionally performed by waterborne vessels. *Tallentire,* 477 U.S. at 217, 106 S. Ct. at 2492.

The United States Constitution grants to federal district courts jurisdiction in all "cases of admiralty and maritime jurisdiction." U. S. Const. art. III, section 2, *Rodrigue v. Legros,* 563 So. 2d 248, 251 (La. 1990). State courts, however, have concurrent jurisdiction by virtue of the "savings to suitors" clause of the Judiciary Act of 1789.[3] This case, although within the federal admiralty jurisdiction, is brought in state court pursuant to the savings clause.

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[3] That provision originally stated:

> The district courts shall have exclusive original cognizance of all civil cases of admiralty and maritime jurisdiction...*saving to suitor, in all cases, the right of a common law remedy, where the common law is competent to give it.*

It is well settled that by virtue of the savings clause "a state, 'having concurrent jurisdiction, is free to adopt such remedies, and to attach to them such incidents as it sees fit' so long as it does not attempt to make changes in the substantive maritime law." (citations omitted) *Tallentire,* 477 U.S. at 221, 106 S. Ct. at 2494. As a general proposition, "[a] maritime claim brought in the common law state courts...is governed by the same principles as govern actions brought in admiralty, i.e., by federal maritime law." *Powell v. Offshore Navigation, Inc.,* 644 F.2d 1063, 1065 n. 5 (5th Cir. 1981), See also T. Schoenbaum, *Admiralty and Maritime Law* § 4-1 at 123 (1987) [hereinafter, Schoenbaum]. Since the general maritime law is not a "complete or all inclusive system," a federal court may adopt state statutory law and common law principles as the federal admiralty rule. Schoenbaum, supra, § 4-1 at 123. State law and regulations may also supplement federal maritime law when "there is no conflict between the two systems of law, and the need for uniformity of decision does not bar state action." Id. at 123.

The U. S. Supreme Court has explicitly recognized the difficulty in defining the interplay of state law and federal maritime law, and has stated: "if one thing is clear it is that the source of law in saving-clause actions cannot be described in absolute terms." *Romero v. International*

Footnote 3 continued.

In 1948 this provision was amended to read:

> The district courts shall have original jurisdiction, exclusive of the courts of the states, of any civil case of admiralty or maritime jurisdiction, *saving to suitors in all cases all other remedies to which they are otherwise entitled.* 28 U.S.C.A. § 1333

This amendment has not, however, changed the scope of the savings clause. D. Robertson, *Admiralty and Federalism,* p.134 (1970).

Terminal Operating Co., 358 U.S. 354 at 373, 79 S. Ct. 468 at 480. Indeed, as Justice Dennis of this court has commented, "[d]espite [a] multitude of cases involving maritime situations, the Court has developed no clear test for determining when such application is appropriate and when it violates the Constitution." *Rodrigue v. Legros*, 563 So. 2d at 253. The question whether La. C.C. art. 2317 applies under these circumstances is a res nova issue in this court. Nor has the U. S. Supreme Court directly addressed whether strict custodial liability may be part of the general maritime law, nor expressly authorized Louisiana's supplementation in that fashion for cases properly within Louisiana courts' jurisdiction and tried in those courts.[4]

The process of determining the applicability of state law in cases within the admiralty jurisdiction has been described as:

> one of accomodation entirely familiar in many areas of overlapping state and federal concern, or a process somewhat analogous to the normal conflict of laws situation where two sovereignties assert divergent interests in a transaction as to which both have some concern. *Kossick*, supra at 738.

Thus, state law may be applied where the state's interest in a matter is greater than the federal interest. This principle, applying the state rule in a matter within the admiralty

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[4] [T]he precise extent to which local rules of law will operate to modify the general maritime law applied in the federal admiralty court is by no means clear. Indeed, it would have to be said that there are not even any clearly visible principles governing the nature and degree of permissible modifications of this sort....[I]t is not clear that state courts are limited with respect to the application of local law to the same degree—whatever it may be—as are the federal admiralty courts." D. Robertson at 146.

jurisdiction when the state interest outweighs the federal interest, has been recognized by the U. S. Supreme Court. See *Huron v. Portland Cement Co. v. City of Detroit,* 362 U.S. 440, 80 S. Ct. 813 (1960) (allowed City of Detroit to impose the requirements of its smoke control regulations on vessels coming to the city, even though vessel owners met federal standards); *Just v. Chambers,* 312 U.S. 383, 61 S. Ct. 687 (1941) (allowed state survival action to supplement maritime law); *Red Cross Line v. Atlantic Fruit,* 264 U.S. 109, 44 S. Ct. 274 (1924) (allowed state court to compel arbitration under arbitration provision of maritime contract reasoning that since it was a valid clause under admiralty law, it was proper to substitute a different and more effective remedy); Cf. *Kossick v. United Fruit Co.,* 365 U.S. 731, 81 S. Ct. 886 (1961) (the U. S. Supreme Court utilized an interest balancing approach but concluded that the need for a uniform rule regarding contracts required allowing the federal rule to prevail).

Louisiana has a strong interest in applying its own law in this case: Plaintiff is a Louisiana resident, Industrial a Louisiana corporation, the pilot a Louisiana resident, and the helicopter was stored in a Louisiana hangar. The contract of carriage between plaintiff's employer and defendants was confected in Louisiana. The mission started in Louisiana and was to end in Louisiana. Plaintiff and defendants, more likely than not, expected to be governed by Louisiana law.

Moreover, La. C.C. art. 2317 embodies a strong social policy to place liability with the owner or custodian of an injury causing thing. This type of liability is not imposed exclusively on helicopter or aircraft owners. Article 2317 liability is imposed on owners and custodians of any thing which, because of an unreasonably dangerous condition, causes injury to another. Also, in the personal injury

area states have much freedom to provide redress for their citizens.

In *Daigle v. Coastal Marine, Inc.*, 488 So. 2d 679, 681 (La. 1986) we stated:

> When congress is silent on a particular question, there is no bar to application of a state statute to its own citizens on the high seas. *Skiriotes v. Florida*, 313 U.S. 69, 61 S. Ct. 924, reh. den. 313 U.S. 599, 61 S. Ct. 1093 (1941). Louisiana can extend the protection of LSA—C.C. art. 2315 to its constitutional limits in personal injury actions involving Louisiana residents where Louisiana has a strong interest in the transaction and there is no conflict with federal law. (citation omitted).

Accordingly, a Louisiana state court should respect Louisiana law unless there is some federal impediment to application of that law contained in federal legislation or a clearly applicable rule in the general maritime law. We have found no such impediment or contrary general maritime rule. Rather, the general maritime law *authorizes* application of state law as a supplement to the general maritime law.

The court of appeal in this case, on the other hand, found that La. C.C. art. 2317 "alters or conflicts with the maritime or admiralty law which establishes the substantive rights of the parties." *Green v. Industrial Helicopters, Inc.*, 576 So. 2d at 1184, citing *Hebert v. Diamond M. Co.*, 376 So. 2d 1210 (La. App. 1st Cir. 1978). This finding was premised upon the assumptions 1) that application of La. C.C. art. 2317 is precluded because the general maritime law does not contain an exact counterpart to Article 2317, and 2) that there is an applicable maritime rule which

requires proof of negligence by a passenger injured in a helicopter crash on the high seas. Although the court of appeal correctly found that the case is governed by the admiralty law, the two underlying assumptions recited above are not well founded. As a matter of logic and legally permissible principle, Louisiana may afford a remedy not traditionally found in the maritime law, provided that the remedy neither conflicts with substantive maritime law nor impermissibly interferes with the requirement of uniformity.

Contrary to the implication of the court of appeal decision, finding an exact counterpart to strict custodial liability in the general maritime law is not a prerequisite for application of La. C.C. art. 2317. The proper inquiry is whether in this setting strict liability under Louisiana law thwarts the purpose of any specific Congressional pronouncement, or "work[s] material prejudice to the characteristic features of maritime law or interfere[s] with the proper harmony or uniformity of that law in its international and interstate relations." *Western Fuel Co. v. Garcia*, 257 U.S. 233, 42 S. Ct. 89 (1921); *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 37 S. Ct. 524 (1917). Thus, the balance of this analysis will entail determining whether there is applicable federal legislation, identifying the "characteristic features of maritime law," and examining the scope of the uniformity requirement.

The first step in our examination involves determining whether there is an applicable Congressional pronouncement governing the liability of a helicopter owner to an offshore worker passenger for injuries sustained by the passenger from a crash landing on the high seas caused by the defective condition of the helicopter. Where Congress has spoken in a particular area, courts engage in the familiar pre-emption analysis. *Offshore Logistics*, supra, at

2494-2500; *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 93 S. Ct. 1590 (1973); *Poche v. Avondale Shipyards, Inc.*, 339 So. 2d 1212, 1218 (La. 1976). Although Congress may have "acted in the admiralty area, state regulation is permissible, absent a clear conflict with the federal law." *Askew*, 411 U.S. at 342, 93 S. Ct. at 1600. Thus, in *Askew* the U. S. Supreme Court refused to enjoin application of the Florida Oil Spill Prevention and Pollution Control Act which imposed strict liability for damage as a result of an oil spill in the state's territorial waters despite the existence of "a pervasive system of federal control over discharges of oil 'into or upon the navigable waters of the United States ...' ". Id. 411 U.S. at 329, 93 S. Ct. at 1954.

The only federal legislation possibly applicable to this incident is Section 1333 (a) of OCSLA, and that statute adopts state law as surrogate federal law. The relevant portions of that section state:

> To the extent that they are applicable and not *inconsistent with...Federal laws and regulations*...the civil and criminal laws of each adjacent State are hereby declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon. (emphasis added) 43 U.S.C.A. 1333 (a) 2 (A).

It appears that OCSLA is not applicable to accidents occurring near a structure located on the outer Continental Shelf. The U. S. Supreme Court has said as much in *Offshore Logistics v. Tallentire*, 477 U.S. 217, 106 S. Ct. 2485 (1986), where the wives of two offshore drilling platform workers, who were killed when the helicopter carrying them from a platform to shore crashed on the high seas, contend-

ed that the more generous state law should apply rather than the Death on the High Seas Act (DOHSA). Specifically, the wives argued that state law applied via the state law extension clause of OCSLA because "OCSLA applies to traditionally maritime locales on the high seas, beyond the confines of the platform, when the decedent is a platform worker." Id. at 477 U.S. 218, 106 S. Ct. 2492. The U. S. Supreme Court dismissed this argument by stating:

> The extension of OCSLA far beyond its intended locale to the accident in this case simply cannot be reconciled with either the narrowly circumscribed area defined by the statute or the statutory prescription that the Act not be construed to affect the high seas which cover the Continental Shelf. Nor can the extention of OCSLA to this case be reconciled with the operative assumption underlying the statute: that admiralty jurisdiction generally should not be extended to accidents in areas covered by OCSLA.
>
> * * *
>
> We do not interpret...43 U.S.C. § 1333, to require or permit us to extend the coverage of the statute to the platform workers in this case who were killed miles away from the platform and on the high seas simply because they were platform workers. Id. 477 U.S. at 218, 106 S. Ct. at 2492.

Tallentire was admittedly a wrongful death case under DOHSA. The U. S. Supreme Court nonetheless found reason to determine that section 1333 (a) of OCSLA does not apply to accidents occurring on the high seas near an OCSLA covered area. This conclusion should apply equally to the personal injury case under consideration here. Since

this accident occurred near but not on a platform located on the outer Continental Shelf, OCSLA's state law extension clause is therefore not triggered.

Absent a clearly applicable act of Congress—and there is none here—we next look to the general maritime law to determine if application of La. C.C. art. 2317 would materially prejudice the "characteristic features of maritime law."

The traditional remedies available for employee injuries occurring within admiralty depend upon a person's classification as a seaman, a non-seaman maritime worker, or a nonmaritime worker. Remedies available to "seamen" include wages, maintenance and cure for injury or illness. Recovery includes payment of actual wages, payment for food and lodging, and the providing of necessary medical services. Seamen have claims, too, for personal injury damages caused by the unseaworthy condition of the vessel. The Jones Act also allows a seaman to recover damages for personal injury occurring because of the negligence of the seaman's co-workers or employer. 46 U.S.C. § 688. Shore-based maritime workers may recover workers' compensation from their employers under the Longshore and Harbor Workers' Compensation Act (LHWCA). 33 U.S.C.S. §§ 901 et seq. Offshore workers may recover compensation from their employers under the LHWCA by virtue of Section 1333 (b) of the Outer Continental Shelf Lands Act (OCSLA).[5]

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[5] 43 U.S.C.A. 1222 (b). Section 1333 (a) calls for the application of state law as "surrogate" federal law. Section 1333 (b), which allows offshore workers to recover under the LHWCA:

> is expansive...[and] extends to every injury or death "occurring as a result of operations...for the purpose of exploring for, developing, removing, or transporting...natural resources. 43 U.S.C.A. § 1333 (b). The

The shipowner's exposure for unseaworthiness is a form of liability without fault in that liability is imposed upon the vessel owner, whether the owner is the injured seaman's employer or a third party, and without regard to his due care or negligence. *The Osceola*, 189 U.S. 158, 23 S. Ct. 483 (1903). It applies if the seaman's injury was caused by a defective condition of the ship, its equipment or appurtenances." Schoenbaum, supra, § 5-3. The warranty of seaworthiness was extended to persons other than "seamen" in *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 66 S. Ct. 872 (1946), although amendments to the LHWCA later eliminated this action.[6]

The U. S. Supreme Court has not addressed whether non-seamen passengers aboard a vessel have an action for unseaworthiness.[7] Lower federal courts, however, have

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Footnote 5 continued.

> state law extension clause [§ 1333 (a)], however, is considerably narrower, providing only for the application of state law to "the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon." *Barger v. Petroleum Helicopters, Inc.*, 692 F.2d 337, 340 (5th Cir. 1982).

[6] The Longshore and Harbor Workers Compensation Act was amended in 1972 and those amendments expanded the categories of workers covered by the Act. The amendments also provide that employees covered by the Act may not assert a cause of action for unseaworthiness. Thus, so called "Sieracki" seamen may no longer assert an unseaworthiness cause of action. T. Schoenbaum, § 5-4 at 171.

[7] Norris suggests that the doctrine of unseaworthiness should be extended to non-seaman passengers aboard a vessel, stating:

> The enlightened view of the present day courts in demanding that a vessel be reasonably fit—and its interpretation of what is reasonable fitness—should apply to the passengers carried in those ships if for no

held that the basis of recovery of damages from a carrier for personal injury to a passenger is predicated on the theory of negligence. M. Norris, *The Law of Maritime Personal Injuries 4th Ed.* § 3:4 at 63 (1990) [hereinafter, Norris].[8]

The latter are among the cases upon which the court of appeal in this case bases its conclusion, and Industrial relies, for its position that Article 2317 conflicts with the general maritime law. The argument is not without some appeal. However, it does not take into account that general maritime law distinctly authorizes application of supplementary state law in some situations. In our considered judgment, the general maritime law authorizes application of state law under the circumstances of this case.

Although the passenger-carrier cases referred to above are somewhat analogous there is this important difference. Those cases involved passengers aboard vessels. And the need for uniformity under the general maritime

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Footnote 7 continued.

> other reason than that passengers should be accorded relief now given to cargo. M. Norris, *The Law of Maritime Personal Injuries*, § 3:25 at 102.

[8] See *Katz v. Cie Generale Transatlantique*, 271 F.2d 590 (4th Cir. 1959) (plaintiff injured foot on door sill of ship, carrier liable because of negligent construction and inadequate lighting); *Moore-McCormack Lines, Inc. v. Russak*, 266 F.2d 573 (9th Cir. 1959) (plaintiff injured while dancing on ballroom floor of ship because of slippery condition caused by smashed grape on floor; carrier liable and owes highest degree of care to passenger); *Moore v. American Scantic Line, Inc.*, 121 F.2d 767 (2d Cir. 1941) (plaintiff injured while skipping rope on bridgedeck when foot struck uneven spot on deck; defendant liable because owes duty to exercise very high degree of care for safety of passengers); *Counts v. Lafayette Crewboats, Inc.*, 622 F. Supp. 299 (W.D. La. 1983) (plaintiff injured due to his own negligence while attempting to step from platform onto crewboat).

law is prompted primarily by concern regarding maritime shipping and commerce *involving vessels.* The U.S. Supreme Court has declared that helicopters and other aircraft are not vessels, and commentators have urged that aircraft should not be treated like vessels. *Offshore Logistics v. Tallentire,* supra, *Smith v. Pan Air Corp.,* 684 F.2d 1102 (5th Cir. 1982); See also Schoenbaum, supra, § 3-6 at 80; R. Greco, *Aircraft As Vessels Under the Jones Act and General Maritime Law,* 22 S. TEX. LJ 595 (1982); Comment, *Admiralty Jurisdiction: Airplanes and Wrongful Death in Territorial Waters,* 64 Columbia Law Review 1084, 1089 n. 51-56 (1964). Aircraft are designed to cope with the perils of the air rather than the hazards of the sea. *Barger v. Petroleum Helicopters, Inc.,* 692 F.2d 337 (5th Cir. 1982), rehearing denied 698 F.2d 1216 (5th Cir. 1983). The U. S. Supreme Court in *Executive Jet Aviation, Inc. v. City of Cleveland, Ohio,* 409 U.S. 249, 93 S. Ct. 493 (1972) "noted that substantive maritime law ha[s] developed to serve a specialized industry, the transportation of goods and persons by water. Although aviation ha[s], to some extent, supplanted this traditional maritime activity, the ancient body of substantive law tailored to fit the needs of vessels and mariners was not suited to the problems of aircraft and aviation." J. Forney and M. Sydow, *Admiralty Jurisdiction Over Injuries to Offshore Workers: A Call for Reconsideration of Robison,* 22 S. Tex. LJ 461, 463 (1982).[9] Had the helicopter crashed on land

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[9] Justice Stewart, writing for the Court in *Executive Jet* heavily criticized the inclusion of aircraft in admiralty law and stated:

> The law of admiralty has evolved over many centuries, designed to handle problems of vessels relegated to ply the waterways of the world, beyond whose shores they cannot go. That law deals with navigational rules—rules that govern the manner and direction those vessels may rightly move upon the waters. When a collision occurs or a ship founders at sea, the law of ad-

soon after taking off from Milton, Louisiana, without question a Louisiana court hearing the case could and should apply La. C.C. art. 2317.

Moreover, there is in the general maritime law no prohibition against strict liability. On the contrary, the general maritime law embraces strict liability in various forms. Most recently the U. S. Supreme Court has recognized "products liability, including strict liability, as part of the general maritime law." *East River S.S. Corp. v. Transamerica Delaval,* 476 U.S. 858, 106 S. Ct. 2295 (1986). The rationale that "[s]trict liability should be imposed on the party best able to protect persons from hazardous equip-

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Footnote 9 continued.

> miralty looks to those rules to determine fault, liability, and all other questions that may arise from such a catastrophe. Through long experience, the law of the sea knows how to determine whether a particular ship is seaworthy, and it knows the nature of maintenance and cure. It is concerned with maritime liens, the general average, captures and prizes, limitation of liability, cargo damage, and claims for salvage.
>
> Rules and concepts such as these are wholly alien to air commerce, whose vehicles operate in a totally different element, unhindered by geographical boundaries and exempt from the navigational rules of the maritime road. The matters with which admiralty is basically concerned have no conceivable bearing on the operation of aircraft, whether over land or water. ...Although dangers of wind and wave faced by a plane that has crashed on navigable waters may be superficially similar to those encountered by a sinking ship, the plane's unexpected descent will almost invariably have been attritutable to a cause unrelated to the sea—be it pilot error, defective design or manufacture of airframe or engine, error of a traffic controller at an airport, or some other cause; the determination of liability will thus be based on factual and conceptual inquiries unfamiliar to the law of admiralty. 409 U.S. at 269-70, 93 S. Ct. at 505.

ment" applies equally to strict products liability claims, Id. 476 U.S. at 866, 106 S. Ct. 2299. Another form of strict liability recognized in the general maritime law is the above discussed seaman's action for unseaworthiness. Given the lack of maritime rule clearly applicable to a helicopter crash on the high seas and the recognition of liability in the absence of fault in the general maritime law, strict custodial liability embodied in Louisiana Civil Code article 2317 cannot be said to "materially prejudice" characteristic features of the general maritime law.

The last step in our inquiry requires analyzing the scope of the uniformity requirement. The requirement of national uniformity in the area of the maritime law has dictated that state law not apply in certain situations. D. Robertson at 146; See cases cited in *Rodrigue v. Legros,* 563 So. 2d at 252; *Kossick v. United Fruit Co.,* supra, *Southwestern Sugar & Molasses Co. v. River Terminals Corp.,* 358 U.S. 811, 79 S. Ct. 38 (1959); *Bisso v. Inland Waterways Corp.,* 349 U.S. 85, 75 S. Ct. 629 (1955); *Pope and Talbot, Inc. v. Hawn,* supra; *Robbins Dry Dock & Repair Co. v. Dahl,* 266 U.S. 449, 45 S. Ct. 157 (1925).

On the other hand, courts have from time to time supplemented general maritime law with state law, such as in cases affecting "the exercise of...[the state's] police powers or in the provision of an additional maritime tort remedy." *Powell,* supra, at 1065, n. 5 referring to *Askew v. American Waterways Operators, Inc.,* 411 U.S. 325, 93 S. Ct. 1590 (1973), rehearing den. 412 U.S. 93, 33 S. Ct. 2746 (1973); *Romero v. International Terminal Operating Co.,* supra, 358 U.S. at 373-74, 79 S. Ct. at 480-81; *Just v. Chambers,* 312 U.S. 383, 387-92, 61 S. Ct. 687, 690-93 (1941). As Justice Black acknowledged in *Pope & Talbot v. Hawn,* 346 U.S. 406, 410, 74 S. Ct. 202, 205 (1953), "states may sometimes supplement federal maritime policies

[although] a state may not deprive a person of any substantial maritime rights." The U. S. Supreme Court later stated that:

> [i]t is true that state law must yield to the needs of a uniform federal maritime law when this Court finds inroads on a harmonious system. But this limitation still leaves the states a wide scope. State-created liens are enforced in admiralty. State remedies for wrongful death and state statutes providing for the survival of actions, both historically absent from the relief offered by the admiralty, have been upheld when applied to maritime causes of action. Federal courts have enforced these statutes. State rules for the partition and sale of ships, state laws governing the specific performance of arbitration agreements, state laws regulating the effect of a breach of warranty under contracts of maritime insurance-all these laws and others have been accepted as rules of decision in admiralty cases, even, at times, when they conflicted with a rule of maritime law which did not require uniformity. *Romero v. International Term. Operat. Co.*, 358 U.S. 354, 373, 79 S. Ct. 468, 480-481 (1959).

Generally where maritime contracts are involved, the federal interest is at its "zenith," *Rodrigue v. Legros,* supra, while in maritime tort cases the interest in uniformity is minimal because of the "fortuitous nature of accidential injuries and the strong state interest in providing redress for injuries." Id. at 254. The uniformity requirement is also tempered with a recognition that in some matters local concerns outweigh the federal need for a uniform admiralty rule. To this end the "maritime but local" doctrine emerged from U. S. Supreme Court decisions. See *Western Fuel Co. v. Garcia,* supra, §§ 4:5, 4:6 at 115-122.

Underlying the "maritime but local" doctrine is the rationale that "[i]f it [can] be said that the work activities of the injured employee [have] no direct concern with navigation or commerce, it [is] 'local' and therefore the State laws [are] applicable." Norris, supra, § 4:6 at 117. The Court has extended this reasoning to recognize a "twilight zone" or "area of doubt" within which the Longshore and Harbor Worker's Compensation Act and state compensation acts may overlap, allowing the injured worker to recover under either of them. Norris, supra, § 4:6 at 121; See *Hahn v. Ross Island Sand & Gravel Co.*, 358 U.S. 272, 79 S. Ct. 266, (1959); *Davis v. Department of Labor & Industries*, 317 U.S. 249, 63 S. Ct. 225 (1942).

The respect for comity underlying the "maritime but local" doctrine remains a viable rationale for allowing state law to supplement the general maritime law. See *Askew v. American Waterways Operators, Inc.*, supra, (states may constitutionally exercise their police power regarding maritime activities concurrently with Federal Government); *Palestina v. Fernandez*, 701 F.2d 438 (5th Cir. 1983) (boating accident which occurred on navigable Louisiana waterway described as a "garden variety state tort claim" and the state law applied); *Baggett v. Richardson*, 473 F.2d 863 (5th Cir. 1973) (fight aboard a vessel considered a Louisiana tort claim in all other respects). This court applied the "maritime but local" and "twilight zone" doctrine in *Beverly v. Action Marine Services, Inc.*, 433 So. 2d 139 (La. 1983) to allow the nondependent parents of a deceased employee of a company engaged in cleaning and repairing ocean-going vessels, recovery under the Louisiana Workers' Compensation Act despite lack of a remedy in favor of nondependent parents under the LHWCA.

An offshore worker's employment activities have no "direct concern" with maritime shipping or commerce.

Norris, supra, § 4:6 at 117. The U. S. Supreme Court has stated that work related to offshore oil and gas exploration is not "maritime employment." *Herb's Welding Inc. v. Gray,* 470 U.S. 414, 105 S. Ct. 1421 (1985). Therefore, the tangential relationship of offshore drilling to traditional maritime activities along with the strong Louisiana interest in a case of this nature bring this case within the "maritime but local" doctrine.

That offshore employment is of particularly local concern and not a maritime vocation is evidenced by the policies underlying Section 1333 (a) of OCSLA. In that "state law extension clause," Congress "deliberately eschewed the appliction of admiralty principles" to incidents occurring on a platform or island on the outer Continental Shelf since "accidents on the artificial islands covered by OCSLA '[have] no more connection with the ordinary stuff of admiralty than do accidents on piers.' " *Tallentire,* 477 U.S. at 217, 106 S. Ct. 2491 citing *Rodrigue vs. Aetna Casualty & Surety Co.,* 395 U.S. 352, 361-366, 89 S. Ct. 1835, 1840-1842 (1969). Instead, Congress adopted the law of the adjacent state as "surrogate" federal law governing accidents occurring on "the subsoil and seabed of the OCS and artificial islands and fixed structures erected thereon." Implicitly, this provision recognizes the offshore worker's significant tie with the adjacent state. Had Green been injured on the Exxon platform, Louisiana law could have been applied via the state law extension provision of OCSLA (provided of course that it is not "inconsistent ... with Federal laws and regulations"). 43 U.S.C.A. 1333 (a) 2 (A); *Olsen v. Shell Oil Company,* 365 So. 2d 784 (La. 1978).

Further evidence that Congress is not insistent on uniformity in the maritime law regarding offshore exploration and drilling is found in the 1982 amendment to the Jones Act, now found in section 688 (b). That statue precludes maintenance and cure and Jones Act claims for

damages, regarding incidents occurring in territorial waters overlaying the Continental Shelf of a nation other than the United States, its territories and possessions if there is a remedy available under the laws of the nation asserting jurisdiction over the area or under the laws of the nation where at the time of the incident the injured person maintains citizenship or residency. 46 U.S.C.A. 688 (b).[10]

It is evident from the cases just discussed and the federal statutes to which we have alluded that there is a lessened need for uniformity in a case like the one before us.

In summary we conclude that there is no applicable contrary federal legislation and that La. C.C. art. 2317 neither prejudices the characteristic features of the general maritime law nor interferes impermissibly with any required uniformity in such law.

---

[10] Section 688 (b) of the Jones Act (46 U.S.C.A. 688 (b)) states:

> (1) No action may be maintained under subsection (a) of this section or under any other maritime law of the United States for maintenance and cure for damages for the injury or death of a person who was not a citizen or permanent resident alien of the United States at the time of the incident giving rise to the action if the incident occurred—
>
> * * *
>
> (B) in the territorial waters or waters overlaying the conntinental shelf of a nation other than the United States, its territories, or possessions.
>
> (2) The provisions of paragraph (1) of this subsection shall be applicable if the person bringing the action extablishes that no remedy was available to that person—
>
> (A) under the laws of the nation asserting jurisdiction over the area in which the incident occurred: or
>
> (B) under the laws of the nation in which, at the time of the incident, the person for whose injury or death a remedy is sought maintained citizenship or residency.

Article 2317 applies in this case. The court of appeal panel, in its opinion of April 18, 1990, is correct. The more recent opinion of the court of appeal sitting en banc is incorrect. *Duhon v. Petroleum Helicopters, Inc.*, 554 So. 2d 1270 (La. App. 3 Cir. 1989), writ denied, 559 So. 2d 1360 (La. 1990), is overruled.

DECREE

For the foregoing reasons the March 13, 1991, judgment of the court of appeal on remand, 576 So. 2d 1183 (La. App. 3 Cir. 1991), is reversed and set aside. Judgment of the court of appeal, dated April 18, 1990, 560 So. 2d 684 (La. App. 3d Cir. 1990), which amended and affirmed the district court, and remanded to the district court on an incidental issue,[11] is reinstated and affirmed.

---

[11] After the district court judgment in favor of plaintiff was rendered and after the delay for suspensive appeal had run, upon motion to the court Industrial deposited the amount of the judgment plus accrued interest into the registry of the court. This procedure is a jurisprudential creation which allows a defendant cast in judgment to stop the accrual of legal interest. *LaGraize v. Bickham*, 391 So. 2d 1185 (La. App. 4th Cir. 1980). The trial judge granted Industrial's motion without a contradictory hearing. Plaintiff appealed to increase the award and Industrial, in its answer, contended that the deposit of money into the registry effectively terminated the accumulation of legal interest on the amount of the judgment. The court of appeal, in its decision of April 18, 1990, concluded that the trial judge erred in granting the motion ex parte and remanded this issue to the trial court to determine if the conditions of *LaGraize* were met.

SUPREME COURT OF LOUISIANA

NO. 91 C 0589 c/w 91 C 0860

MICHAEL J. GREEN,
UNITED STATES FIDELITY & GUARANTY CO.

Versus

INDUSTRIAL HELICOPTERS, INC.

WATSON, Justice, Concurring.

In the field of personal injury, state law may supplement general maritime law. *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 101 S. Ct. 2870, 69 L.Ed.2d 784 (1981). Louisiana's law of strict liability applies to injuries on the outer continental shelf off the shores of Louisiana. *Olsen v. Shell Oil Company*, 365 So. 2d 1285 (La. 1978). Only when there are deaths on the high seas does DOHSA pre-empt state law. *Tallentire; Smith v. Pan Air Corp.*, 684 F.2d 1102 (5th Cir. 1982).

I concur to note that the majority's analysis of OCSLA may err in drawing a bright line of demarcation between platform injuries and high sea injuries. In *Tallentire*, the platform workers were killed miles away from the platform. By its terms, OCSLA's scope is not limited to platforms. A platform worker who is injured in the water near a rig has maritime situs. *Executive Jet Aviation v. Cleveland*, 409 U.S. 249, 93 S. Ct. 493, 34 L.Ed.2d 454 (1972). However, the worker may lack maritime status. *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352,

23 L.Ed.2d 360, 89 S. Ct. 1835 (1969); *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 105 S. Ct. 1421, 84 L.Ed.2d 406 (1985). Therefore, a platform worker's injuries in the water are not necessarily maritime and may be covered by OCSLA.

I respectfully concur in the majority opinion.

SUPREME COURT OF LOUISIANA

FOR IMMEDIATE NEWS RELEASE

NEWS RELEASE # 024

FROM: CLERK OF SUPREME COURT OF LOUISIANA

On the *20th day of February, 1992,* the following action was taken by the Supreme Court of Louisiana in the case(s) listed below:

REHEARING GRANTED:

88-KH - 2816 STATE EX REL IRA JOE MIMS V. HILTON BUTLER, WARDEN LOUISIANA STATE PENITENTIARY (Parish of Caddo) Gaudin, J., for Hall, J., recused.

REHEARINGS DENIED:

91-C - 0859 C/W 91-C - 0860 MICHAEL J. GREEN, UNITED STATES FIDELITY & GUARANTY CO. v. INDUSTRIAL HELICOPTERS, INC. AND DOUG WRIGHT (Parish of Lafayette)

91-C - 1009 SUCCESSION OF CHARLIE DOLL VS PADDY ANN DOLL CONSOLIDATED WITH LUDEWEKA DOLL SULLIVAN v. PADDY ANN DOLL (Parish of Caddo) (Two Applications)

91-C - 1357 JENERA MUNDY v. THE DEPARTMENT OF HEALTH AND HUMAN RESOURCES, ET AL (Parish of Orleans)

91-C - 1377 KARLAN GREENE, ET AL v. GULF COAST BANK (Parish of Vermilion)

91-CA - 1565 ARNY RAY REED, JERRY T. BOYCE, AND FIVE M ENTERPRISES, INC., D/B/A TRIANGLE SHELL v. THE CITY OF NEW ORLEANS AND PAUL MITCHELL, JR., DIRECTOR OF FINANCE OF THE CITY OF NEW ORLEANS (Parish of Orleans)

APPENDIX B

IN THE

SUPREME COURT OF LOUISIANA

NUMBER: 91-C-0859 and 91-C-0860

MICHAEL J. GREEN
Applicant-Plaintiff

UNITED STATES FIDELITY
& GUARANTY COMPANY
Applicant-Intervenor

VERSUS

INDUSTRIAL HELICOPTERS, INC.
Respondent-Defendant

APPLICATION FOR REHEARING
ON BEHALF OF RESPONDENT-DEFENDANT,
INDUSTRIAL HELICOPTERS, INC.

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ATTORNEYS FOR
INDUSTRIAL HELICOPTERS, INC.

IN THE

SUPREME COURT OF LOUISIANA

DOCKET NUMBERS: 91-C-0859 and 91-C-0860

MICHAEL J. GREEN, Applicant-Plaintiff
UNITED STATES FIDELITY
& GUARANTY COMPANY, Applicant-Intervenor

VERSUS

INDUSTRIAL HELICOPTERS, INC.,
Respondent-Defendant

APPLICATION FOR REHEARING

NOW INTO COURT, through undersigned counsel, comes **INDUSTRIAL HELICOPTERS, INC.**-Respondent-Defendant in these proceedings, who respectfully represents that the judgment of this Honorable Court rendered herein on the 17th day of January, 1992, reversing the judgment of the En Banc panel of the Third Circuit Court of Appeals, on remand, 576 So.2d 1183 (La. App. 3rd Cir. 1991) and reinstating the judgment of the Third Circuit Court of Appeals rendered April 18, 1990, 560 So.2d 684 (La. App. 3rd Cir. 1990), is erroneous and contrary to the law and is prejudicial to **INDUSTRIAL HELICOPTERS, INC.** for the following reasons:

I.

The Louisiana Supreme Court has created a new federal cause of action and is not enpowered to do so, that power being exclusively reserved to the United States Congress or the United States Supreme Court.

2.

The decision of the Louisiana Supreme Court will result in various and different remedies for passengers of helicopters and other aircraft and vessels who are injured on the high seas, *depending primarily on their state citizenship and the proximity of the accident site to the state involved (on the Federal waters in which the accident occurs)*. This will result in non-uniformity of application of general maritime principles in contravention of the federal supremacy clause and the federal pre-emption of state law when the state law conflicts with federal law.

3.

INDUSTRIAL HELICOPTERS, INC. files herewith in connection with this application for a rehearing, a brief in support thereof and shows that for the reasons hereinabove stated and set forth in said brief, a rehearing should be granted.

WHEREFORE, premises considered, **INDUSTRIAL HELICOPTERS, INC.** prays that a rehearing be granted in this appeal and that after due proceedings are had, the judgment rendered herein on the 17th day of January 1992, be set aside and reversed and that there be judgment herein dismissing the Plaintiff's cause of action in its entirety.

Respectfully submitted,

SONNIER, HEBERT & HEBERT

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**INDUSTRIAL HELI-
COPTERS, INC.**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have served the foregoing pleading on all counsel of record herein by depositing a copy of same in the U.S. Mail, postage prepaid and properly addressed.

Abbeville, Louisiana, this 30th day of January, 1992.

/s/ Charles R. Sonnier

CHARLES R. SONNIER

IN THE

SUPREME COURT OF LOUISIANA

DOCKET NUMBERS: 91-C-0859 and 91-C-0860

MICHAEL J. GREEN, Applicant-Plaintiff
UNITED STATES FIDELITY
& GUARANTY COMPANY, Applicant-Intervenor

VERSUS

INDUSTRIAL HELICOPTERS, INC.,
Respondent-Defendant

ORDER

Considering the foregoing Application by **Industrial Helicopters, Inc.** and being of the opinion that good cause is shown therein for granting rehearing, let the above entitled and numbered cause be fixed for argument as a preference case.

NEW ORLEANS, LOUISIANA, this ____ day of _____,1992.

SUPREME COURT JUSTICE

3101-5/PLDG/REHERING.MOT

BRIEF IN SUPPORT OF APPLICATION FOR REHEARING

The Court's decision, holding state strict liability, Civil Code Article 2317, applicable to a non-seaman passenger injured in offshore Federal waters, if allowed to stand, will create havoc in the maritime personal injury law of the United States. The recognition of legitimate state interests must be tempered with those circumstances where the state law conflicts with, rather than supplements, General Maritime Law remedies, as Civil Code Article 2317 does in this case. State interest must also be balanced with the spectre of the creation of different remedies applying to the same type of injury, depending on the adjacent state's law.

The "characteristic features of the General Maritime Law" are "materially prejudiced" by this decision. One can envision non-seaman helicopter passengers injured in offshore watrers, beyond the territorial limit, yet not subject to OCSLA, being subject to different levels of relief and having various laws (each adjacent state's laws) apply to their circumstance depending on the fortuitous event of the site of the accident. The General Maritime Law has always been opposed to any such operation of law and this decision now sets these possibilities in motion.

What about the passenger on a cruise ship? The decision now places those passengers subject to any number of laws even though the ship follows a path in Federal waters. *Everett v. Carnival Cruise Lines, Inc.*, 912 F.2d 1355 (11th Cir. 1990) held that Federal Admiralty Law rather than Florida law controlled the substantive issue in a case where a passenger sued a cruise line for injuries when she tripped over a metal threshold cover of a fire door. Following a long line of cases, the court held that the case involved a

maritime tort on Federal waters and Federal Admiralty Law should control. "If the injury occurred on navigable waters, Federal Maritime Law governs the substantive issue". *Everett* at p. 1358.

If a Louisiana resident, cruise ship passenger boards a cruise ship in Louisiana waters with a vessel corporation domiciled in Louisiana, and the passenger is injured off the coast of Louisiana beyond the territorial waters, the decision of this Court would compel no other finding but that Louisiana law should apply. Would the result be the same if the passenger was a Texas resident? What if the vessel was domiciled in Mississippi? Although the connexity with the State interest may be a viable interest, once the three-mile territorial limit is exceeded then the vessel is operating in Federal waters and is under the Federal Admiralty jurisdiction. The body of law to be applied in any injury which occurs beyond that three-mile territorial limit, as previously held in prior jurisprudence, is the Federal Admiralty Law which includes the jurisprudentially established General Maritime Law.

Courts will not always be presented with such a "pure" state interest circumstance as in *Green*. What if Mississippi and/or Texas also had an interest in this case? Which law would then apply? This is not an area where the facts and circumstances of each case should control. The uniformity of remedies under the General Maritime Law should control.

In conjunction with the uniformity requirement, the situs of the incident and its connexity with maritime commerce are critical. *Offshore Logistics, Inc. v. Tallentire,* 477 U.S. 207, 106 S. Ct. 2485, 91. L. Ed 2d 174 (1986) *did* hold that a helicopter performs traditional maritime activity and can be classified as a vessel, yet this Court ignores this

later Supreme Court pronouncement, fourteen years after *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972). This Court's holding reduces the value placed upon the uniformity requirement of admiralty law and isolates this case from a hundred years of admiralty jurisprudence. This ruling is adverse to all prior jurisprudence regarding the applicability of State law beyond the three-mile territorial limits. Should this case be upheld, it would severely impact admiralty tort law and open the flood gates to further litigation.

Ali v. Offshore Co., 753 F.2d 1327 (5th Cir. 1985) at footnote 11 on page 1332 sets forth language which further isolates the *Green* decision. The Fifth Circuit states:

> Even if the Louisiana law of products liability applies to the manufacturers in this case, we doubt very much whether art. 2317 could be applied to the owners and operators of the ship. It appears to us that such recognized remedies in admiralty as the Jones Act and the suit for breach of warranty of seaworthiness would preempt the field and prevent the application of conflicting Louisiana law.

Toups v. Du-Mar Marine Construction, Inc., 644 F. Supp (E.D. La. 1985) held that Civil Code Article 2315 did not supply a remedy in addition to that provided by General Maritime Law, but in fact, imposed relief which the General Maritime Law did not allow. *Toups* found that since this seaman had no right to sue for negligence under the General Maritime Law, his survivors could not sue for loss of society, on a negligence theory. Although the context of law in *Toups* is different, the guiding principle remains. That is, Louisiana law cannot provide a remedy which conflicts with the substantive maritime law. The same should hold true in the *Green* case.

We urge the Court to reconsider and grant rehearing.

Respectfully submitted,

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3101-5/SUPPORT.RHG

APPENDIX C

IN THE

SUPREME COURT OF LOUISIANA

NUMBER: 91-C-0859 and 91-C-0860

MICHAEL J. GREEN
Applicant-Plaintiff

UNITED STATES FIDELITY
& GUARANTY COMPANY
Applicant-Intervenor

VERSUS

INDUSTRIAL HELICOPTERS, INC.
Respondent-Defendant

POST ARGUMENT BRIEF
ON BEHALF OF RESPONDENT,
INDUSTRIAL HELICOPTERS, INC.,

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POST ARGUMENT BRIEF

MAY IT PLEASE THE COURT:

INDUSTRIAL HELICOPTERS, INC., Respondent-Defendant, files this post argument memorandum to address the issues raised by this Honorable Court at the hearing of this matter.

Respondent will address the non-applicability of the Outercontinental Shelf Lands Act and distinguish the case of *Smith vs. Pan Air Corporation*, 684 F.2d 1102 (5th Cir. 1982).

The Congressional enactment of the Outercontinental Shelf Lands Act, 43 USC § 1333 *et seq.* (hereinafter "OCSLA") was a legislative derivative of Congress' intent to protect offshore workers, utilized in the extraction of petroleum products from the subterranean ocean floor beyond the State territorial limits. Congress recognized the problem facing offshore workers who lacked the requisite foundation to be declared "*seamen*". By enacting the OCSLA, Congress allowed State law to be applied to accidents occurring on fixed platforms beyond the three-mile territorial limit. In *Smith*, the Fifth Circuit held tht admiralty jurisdiction extends to non death claims arising on the high seas if the aircraft being utilized has a maritime nexus. The Court further went on to state that the "locale test" governs the application of the OCSLA to torts occurring beyond the territorial limits. The *Smith* court noted that the ferrying of passengers to and from offshore platforms is indicative of a traditional maritime activity therefore admiralty jurisdiction is applicable. The same jurisdiction is applicable before this Court. In only one instance has the OCSLA been applied to an action in which the initial impact was not sustained on the platform. In *In*

re Dearborn Marine Services, Inc., 499 F.2d 263 (5th Cir. 1974), *cert. dismissed*, 423 US 886, 96 S.Ct. 163, 46 L.Ed.2d 118 (1975), a platform worker was on a standy vessel when an explosion occurred on the platform. A ball of fire engulfed the standby vessel killing the worker. The court noted however that the tortious conduct arose from the platform and State Law was invoked through the Outercontinental Shelf Lands Act.

In a case decided after *Smith, Offshore Logistics, Inc. vs. Tallentire*, 477 US 207, 91 L.Ed.2d 174, 106 S.Ct. 2485 (1986), the Supreme Court barred the application of the Louisiana Wrongful Death Statute under the provisions of the OCSLA and found it to be inconsistent with applicable federal law. The facts of the *Tallentire* case (particularly the maritime connexity on the high seas) closely parallel the case before this Honorable Court with the exception that the injury resulted in death. *Tallentire* held that the applicability of the OCSLA is confined to the artificial islands permanently affixed to the subsoil and sea bed of the Outercontinental Shelf. Accordingly, the state law application which derives from the OCSLA hinges on the requirement that the accident or injury occur on the fixed platform and is on the outer-continental shelf or that the tortious conduct arises from the fixed or artificial platform. That is not what occurred here and any reliance upon *Smith* is misplaced in light of *Tallentire*.

State law cannot apply as surrogate federal law in any instance if there is a conflict with the remedy under State Law and the federal general maritime law. This principle was most recently recognized in *Dean v. Maritime Overseas Corp.*, 770 F.Supp. 309 (E.D.La. 1991) citing *Pope & Talbot v. Hawn*, 346 US 406, 74 S.Ct. 202, 98 L.Ed. 143 (1953) which held that while state law may supplement federal maritime policies, federal maritime law controls

rights of recovery rooted in admiralty. In the case before this Court, that irreconcilable conflict between state and federal law *does* exist and this Court should find that the general maritime law applies and that the state law of strict custodial liability is inapplicable, denying Green's claim.

The OCSLA under Section 1333(a)(1) requires extension of U.S. law to the subsoil and seabed of the Outercontinental Shelf *and* all artificial islands (drilling platforms, etc.). This is a dual requirement with the use of the conjunctive "and." Thus, it is not enough to rely on the portion of the statute which addresses the subsoil and seabed but the incident complained must also be related to "artificial islands" which are permanently or temporarily affixed and are not classified as vessels under admiralty law. These requirements are not met in this case.

Furthermore, even if assuming arguendo, OCSLA applies, Section 1333(2)(A) restricts the application of adjacent state law to those laws which are applicable and *not inconsistent* with Federal Law. Federal general maritime law is clear and is substantively different from state law. State law can serve as surrogate state law or supplement federal law *only when* it is not inconsistent with the maritime law. Louisiana's Civil Code Article 2317 (liability without fault) *is* inconsistent with general maritime law (proof of negligence) and thus, Green's claim must be dismissed.

For the Court to reverse the Third Circuit's *en banc* decision it will have to place an interpretation on the OCSLA which the *Smith* case does not warrant and which no court has placed upon it. This Court will also overrule a long line of jurisprudence which (1) accentuates the importance of locality test in admiralty matters and (2) requires

federal supremacy when a state law is inconsistent with federal general maritime law. *Offshore Logistics, Inc. v. Tallentire, supra,; Hebert v. Diamond M Company,* 367 So.2d 1210 (La. App. 1st Cir. 1978); *Freeport Sulphur Company v. S.S. Hemosia,* 526 F.2d 300 (5th Cir. 1976); *State of Louisiana ex rel Guste v. M/V Testbank,* 752 F.2d 1019 (5th Cir. 1985).

Respectfully submitted,

SONNIER, HEBERT & HEBERT

BY: /s/ Charles R. Sonnier

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INDUSTRIAL HELICOPTERS, INC.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have served the foregoing pleading on all counsel of record herein by depositing a copy of same in the United States Mail, postage prepaid and properly addressed.

Abbeville, Louisiana, this 8th day of Nov., 1991.

/s/ Charles R. Sonnier

CHARLES R. SONNIER

APPENDIX D

The Supreme Court of the State of Louisiana

MICHAEL J. GREEN,
UNITED STATES FIDELITY & GUARANTY CO.

VS. No. 91-C - 0859

INDUSTRIAL HELICOPTERS INC. AND
DOUG WRIGHT

— — — — — —

IN RE: United States Fid/Gty. Co.; - Third Party(ies); Applying for Writ of Certiorari and/or Review; to the Court of Appeal, Third Circuit, Number CA88-1365; Parish of Lafayette 15th Judicial District Court Div. "J" Number 857722

— — — — — —

May 17, 1991

GRANTED. (See Order.) Consolidated with 91-C-0860

LHC

PFC

WFM

JLD

JCW

HTL

PH

Supreme Court of Louisiana
May 17, 1991

/s/ Illegible

Clerk of Court
For the Court

MAY 20 1991

The Supeme Court of the State of Louisiana

MICHAEL J. GREEN, et al

VS.

NO. 91-C-0859
(c/w 91-C-0860)

INDUSTRIAL HELICOPTERS, INC.,

In re. United States Fidelity & Guaranty Co. **applying for Writ of** Certiorari and /or Review **No.** 85772 **on the docket of the** 15th Judicial **District Court for the Parish of** Lafayette, and **No.** CA88-1365 **on the docket of the Court of Appeal,** Third **Circuit, State of Louisiana.**

And, whereas, the Court has this date, pursuant to Article 5, Section 5, of the Constitution of Louisiana, made and issued the following order, to-wit — "It is ordered that the writ of review issue; that the District Court and the Court of Appeal send up the record in duplicate of the case; and that counsel for all parties be notified."

Now, therefore, the said District Court and the Court of Appeal is hereby commanded, in the name of the State of Louisiana and of this Honorable Court, to send up forthwith to this Court, at the City of New Orleans, the record in duplicate of the above entitled case.

Witness the Honorable Justices of the Supreme Court of the State of Louisiana, on this 17th day of May, in the year of Our Lord, One Thousand, Nine Hundred and Ninety-One.

/s/ Frans J. Labranche, Jr.

Frans J. Labranche, Jr.
Clerk of Court

MAY 20 1991

APPENDIX E

IN THE
SUPREME COURT OF LOUISIANA

NUMBER: 91-C-0860

MICHAEL J. GREEN
Applicant-Plaintiff

UNITED STATES FIDELTIY
& GUARANTY COMPANY
Applicant-Intervenor

VERSUS

INDUSTRIAL HELICOPTERS, INC.
Respondent-Defendant

OPPOSITION TO PLAINTIFF'S AND
INTERVENOR'S APPLICATION
FOR WRIT OF CERTIORARI ON BEHALF OF
INDUSTRIAL HELICOPTERS, INC.

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GENERAL RESPONSE TO WRIT APPLICATIONS OF PLAINTIFF AND INTERVENOR

The Application for Writ of Certiorari filed by the Plaintiff and Intervenor in this matter should be denied for several reasons and each Assignment of Error will be specifically addressed. Your Respondent in this Writ, INDUSTRIAL HELICOPTERS, INC., however, considers it necessary to make a general opposition and objection to the Writ Application, based on principles of procedure and substantive law.

The Applicants seek relief from the Court for matters already considered in a previous writ application and therefore, this Application should be denied. It is in fact precluded, by the principle of res judicata as per Louisiana Code of Civil Procedure Article 927 and L.R.S. 13:4231. Res judicata bars the relitigation of the object of a judgment when there is identity of the thing demanded, the same cause of action and the same parties appearing in the same quality. *Louisiana Business College v. Crump*, 474 So.2d 1365 (La. App. 2d Cir. 1985).

Pursuant to INDUSTRIAL HELICOPTERS' Writ Application of June 20, 1990, the Supreme Court granted writs on October 19, 1990 and remanded the case to the Third Circuit Court of Appeals, *En Banc*, to consider the cases of *Duhon vs. Petroleum Helicopters, Inc.*, 554 So.2d 1270 (La. App. 3d Cir. 1989), *rehearing denied, writ denied*, 559 So.2d 1360 (La. 1990) and the case of *Green vs. Industrial Helicopters, Inc.*, 560 So.2d 684 (La. App. 3rd Cir. 1990) *rehearing denied, writ granted*, remand for *en banc*, 567 So.2d 1107 (La. 1990), to compare the decisions and determine whether the *Green* decision was in conflict with the *Duhon* decision and, if so, which decision was correct. The response of the present Applicants to the June 20,

1990 writ included the very issues raised in this application.

The Application now filed with this Court should not be considered because for all practical purposes, the *Duhon* decision was decided by this Court by the denial of the writs in that case. Conversely, the *Green* decision was also decided by this Court with the granting of the June 20, 1990 writ of Industrial Helicopters and the subsequent *en banc* decision of the Third Circuit finding *Green* in conflict with *Duhon* and that *Duhon* should be the controlling, correct and applicable law in Louisiana.

The Third Circuit, pursuant to the directive of the Supreme Court, has also determined the merits of the case and not only ruled that the *Duhon* decision is the correct decision and that *Green* was in conflict with it, but also reversed the trial court in the *Green* case. *A fortiori*, if this Court has already denied writs in the *Duhon* decision, previously granted writs in this case with identical issues, and the Third Circuit, *en banc*, under directive from the Supreme Court, has already agreed that the *Duhon* decision is the correct legal principle to determine the issues in this case, the application for this writ is procedural error.

Similarly, and by the same principle, any intimation that Respondent-Defendant failed to timely raise a pre-emption defense and/or waived its right to appeal by invoking a procedure to terminate legal interest is a moot issue. The pre-emption and waiver matters have been considered by the original panel of the Third Circuit, this Honorable Court, and the Third Circuit, *en banc*, respectively. The last two panels' decisions, going to the merits of the issues, serve to nullify any legal argument regarding the failure to claim pre-emption defenses or the waiver of the right to appeal. These panels had the issue briefed before them and

their silence on these issues coupled with a decision on the merits, renders these complaints moot and the application should be denied on this basis as well.

This general objection should serve as ample support to deny the Writ Application and let the Third Circuit's *en banc* decision stand. However, Respondents, out of caution, must necessarily oppose the specific Assignments of Error in Plaintiff's Application and where applicable differentiate Intervenor's Application as well.

PLAINTIFF'S ASSIGNMENT OF ERROR I

I. **THE COURT OF APPEALS ERRED IN APPLYING MARITIME LAW TO THE EXCLUSION OF THE LAW OF THE STATE OF LOUISIANA IN THIS MATTER.**

RESPONSE TO PLAINTIFF'S ASSIGNMENT OF ERROR I

The Third Circuit's decision in *Green, en banc*, that the general maritime law precludes the use of Louisiana Civil Code Article 2317 strict liability is correct. Plaintiff-Applicant's contention that it was error to apply maritime law flies in the face of more than two hundred years of constitutional statutory and jurisprudential authority. Significant state interest can be a valid relevant concern, but not in this case. In the case where maritime law is the primary substantive law and state law specifically contradicts the principles of maritime law, state interests must fail.

Duhon recognized this. So did the *en banc* panel in *Green*.

The citizenship of the litigants is irrelevant when maritime law is the controlling substantive law and state law contradicts the general maritime law as it does here.

The *Green* case involved essentially a maritime accident in offshore waters, which should be governed by the general maritime law regardless of state citizenship. Under the general maritime law, proof of negligence is required but there is no corresponding theory of strict liability under such law. Article 2317, however, deals exclusively with strict liability and requires no proof of negligence. The substantive law conflict requires that general maritime law pre-empt 2317. There can be instances when state law supplements the general maritime law. This, however, is not one of them since there is a conflict. Since helicopters perform traditional maritime activities, claims against the vessel (helicopter) owner are controlled by the precepts of unseaworthiness. Such precepts, rooted in negligence, are dispositive of a passenger's claim against a common carrier for damages and not strict liability.

Duhon and *Green* now hold that maritime law requires an injured passenger to prove negligence in order to recover from a common carrier because the general maritime law prevails over the state's strict liability remedy for damages caused by a thing in custody, which would not require proof of negligence. These rulings should not be disturbed. The Third Circuit is now united in its decision on this issue.

The facts of the *Green* case are indistinguishable from *Duhon*. We contend the facts give rise to an action under maritime law even if such claim is not affirmatively asserted in the plaintiff's petition. (We hasten to repeat that Plaintiff asked for relief under all applicable *Federal* or Louisiana Statutes [Emphasis added]).

The jurisprudence supports INDUSTRIAL HELICOPTERS' contention that the *Duhon* holding, and the reasoning therein, adopted by *Green* almost verbatim, should control.

Claims arising from an aircraft accident are cognizable in admiralty if the wrong sued upon satisfies maritime locale requirements and bears a significant relationship to traditional maritime activity. *Executive Jet Aviation, Inc. v. Cleveland,* 409 U.S. 249, 93 S.Ct. 493 (1972).

The crash of a helicopter while it is being used in place of a vesel to ferry personnel and supplies to and from an offshore drilling structure, bears a significant relationship to traditional maritime activities which supports admiralty jurisdiction under the "savings to suitors" clause, 28 USC Sec. 1333. *Ledoux v. Petroleum Helicopters, Inc.,* 609 F.2d 824 (5th Cir. 1980), *rehearing denied* 612 F.2d 579.

Admiralty jurisdiction is present in an action arising out of a helicopter crash into the high seas in the Gulf of Mexico outside the boundaries of the state, where the helicopter performs the ordinary functions of a crewboat, ferrying workers from offshore rigs to the mainland. *Higginbotham v. Mobil Oil Corp.,* 357 F.Supp. 1164 (W.D.La. 1973), supp. op. 360 F.Supp. 1140 (W.D.La. 1973), affirmed in part, and reversed in part on other grounds 545 F.2d 422 (5th Cir. 1974).

Bordelon v. T.L. James & Co., 380 So.2d 226 (La. App. 3rd Cir. 1980), held that a state court hearing a case within a federal admiralty jurisdiction pursuant to the "savings to suitors" clause is required to apply substantive admiralty or maritime law if the claim is cognizable in admiralty.

A helicopter ferrying passengers from shore to an artificial island is engaged in a function traditionally performed by water-borne vessels, and if it is involved in an accident on the high seas, admiralty jurisdiction is invoked. *Offshore Logistics, Inc. v. Tallentire,* 477 U.S. 207, 106 S.Ct. 2485 (1986).

Where plaintiffs are in a state court seeking a remedy for a wrong, and the remedy sought under state law alters or conflicts with the maritime or admiralty law which establishes the substantive rights of the parties, then the federal substantive maritime or admiralty law controls, *Hebert v. Diamond M. Company,* 367 So.2d 1210 (La. App. 1st Cir. 1978); *Freeport Sulphur Company v. S. S. Hemosia,* 526 F.2d 300 (5th Cir. 1976); *State of Louisiana ex rel Guste v. M/V Testbank,* 752 F.2d 1019 (5th Cir. 1985). State law may apply on injuries on the outer continental shelf as per *Olsen v. Shell Oil Co.,* 365 So.2d 1285 (La. 1978). However, this is not the case here. Green was injured in offshore waters, in an area not governed by the Outer Continental Shelf Lands Act (OCSLA).

In Plaintiff's desperate attempt to find case law to somehow convince this Court that the above jurisprudential authority, along with the *Duhon* decision, can be overturned, he makes citations to certain cases which are unpersuasive and misleading. The factual relevance of the cited cases are lacking any foundation or connection to the *Duhon* and *Green* facts. In an effort to correct Plaintiff's misapplied references, your Respondent will briefly summarize and distinguish them. Each and every case cited by Plaintiff lacks the critical aspects set forth in the above jurisprudence with regard to maritime locale and traditional maritime activity and the long-standing principle that state law cannot supplement maritime law if a conflict between the two exists.

To facilitate ease of reading our comments, we have taken the liberty to cite the reference cases by footnote.

In *Truehart*[1], cited for the proposition that 2317 is not precluded, Plaintiff neglects to mention that that cae was an insurance liability case and involved the application of State Insurance Law principles in a wrongful death action. In *Gauthier*[2], cited for the same proposition, the claimant was loading tools used in offshore drilling onto a tugboat and was injured on the dock and sued the owner of the dock for a defective dock. These cases have no relevant relation to the work activity being conducted by Mr. Green.

In *Powell*[3], Plaintiff omits the equally critical portion of the decision which holds that state law may supplement maritime law, but **state law may not conflict with federal maritime law.**

The *Baggett*[4], case was a personal injury claim based on assault and battery due to a fight aboard a vessel. Louisiana law did not provide punitive damages so the federal court did not. Again this is not relevant to the case before this Court.

In the two cases cited by Plaintiff in the early part of the brief trying to convince the Court that state law could be applicable, there are key elements missing which this Court should note.

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[1] *Truehart vs. Blandon*, 884 F.2d 223 (5th Cir. 1989).

[2] *Gauthier vs. Crosby Marine*, 752 F.2d 1085 (5th Cir. 1985).

[3] Powell vs. Offshore Navigation, Inc., 644 F.2d 1063 (5th Cir. 1981).

[4] *Baggett vs. Richardson*, 473 F.2d 863 (5th Cir. 1973).

The *New York*[5] case involved a collision which occurred over land when a float plane crossed New Jersey territorial waters and collided with a City Police Department helicopter. The plane crashed into the East River. The helicopter crashed into a building in Brooklyn. This was simply a desperate attempt by the claimants in that case to allege some type of maritime locale. Following *Executive Jet, supra,* the court refused to find any maritime locale or significant relationship to traditional maritime activity. As can be seen from the facts which Plaintiff conveniently sidestepped, it is easy to see that this case has no factual relevance or relationship to the *Green* matter or the determination of its issues.

The same result occurred in the *American Home Assurance*[6] case as that involved an aircraft flying from Atlantic City, New Jersey to Block Island, New York. The court found no significant traditional maritime activity. Again this is a case when the *Executive Jet* parameters were still being tested and has little relevance to the facts of *Duhon* and *Green*.

In the *Cormier*[7] case, an oilfield labor contractor's employee was injured when he tripped over an angle iron protruding from a section of grating on a fuel dock. Plaintiff's brief failed to mention that the corporation responsible for constructing and designing the drainage pan in the grating was held responsible under Article 2317. This is more in the nature of strict products liability of a

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[5] *New York vs. Waterfront Airways, Inc.*, 620 F.Supp. 411 (S.D.N.Y. 1985).

[6] *American Home vs. Assurance vs. U.S.*, 389 F.Supp. 657 (M.D.Pa. 1975).

[7] *Cormier vs. Gulf Oil Corp.*, 665 F.Supp. 1226 (E.D.La. 1987), aff. 857 F.2d 789.

manufacturer, which general maritime law recognizes. The facts have no direct relationship to the position of *Industrial Helicopters* in *Green*.

The citations to the Louisiana Boat Safety Act barely deserve mentioning, but for the sake of thoroughness, the *Kaiser*[8] case involved a wrongful death action from a water-skiing accident on Bayou Lacombe in the north shore of Lake Pontchartrain. It was a diversity action in federal court. The relevance of this accident to any of the concerns before this court with the *Green* decision are suspect.

Several of Plaintiff's cases actually include legal principles which support Respondent's position. In *Beverly*[9], the court stated that a state cannot defeat the uniformity of maritime law. It is precisely the uniformity issue in maritime law and the locale and maritime activity requirements which are at issue in the case before this Court. Likewise, the *Daigle*[10] case, cited for its discussion of significant state interest, states that a state's strong interest must fail when it conflicts with federal law. This case also cites *Tallentire, supra,* which helps support Respondent's arguments here and which the *Duhon* court saw fit to rely upon. In fact, Plaintiff's cites to the U.S. Supreme Court cases in general are irrelevant in light of the *Tallentire* decision which controls the facts of this case.

Even the *F & S Offshore*[11] case, which dealt with manu-

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[8] *Kaiser vs. Travelers Ins. Co.*, 359 F.Supp. 90 (E.D.La. 1973).

[9] *Beverly vs. Action Marine Service*, 433 So.2d 139 (La. 1983).

[10] *Daigle vs. Coastal Marine*, 488 So.2d 139 (La. 1983).

[11] *F & S Offshore vs. Service Mach. & Shipbuilding*, 430 So.2d 1167 (La. App. 1st Cir. 1983).

facturing defects in an ocean towing vessel and was essesntially a redhibition action, recognized that the general maritime law can incorporate the general law of torts **when it is not inconsistent with the law of admiralty,** citing several cases therein.

Several cases cited by Plaintiff for the proposition that 2317 could be available, are distinguishable in that, they dealt with the builder or manufacturer of a dredge (*Bonura*[12]), involved a personal injury action for the negligent handling of a boat during a hunting trip (*Gasquet*[13]) and involved a deckhand on an inland tugboat (*Dean*[14]). All of these are clearly distinguishable.

If Plaintiff's "significant state interest" argument was taken to its logical conclusion, and the foundational philosophy of the maritime law, i.e., the requirement of uniformity and federal supremacy were cast aside, it would lead to unworkable and incomprehensible anomalous results. What happens if we have a Louisiana resident on a Texas based vessel who is on his way to Gulfport, Mississippi with a Louisiana crew and Alabama cargo but somewhere in the ship channel between Louisiana and Mississippi a maritime accident happens? Which state law would control? The maritime law was designed to be uniform and designed to have federal pre-emption in those situations where state law is inconsistent to guard against such problems. We believe the *Duhon* and *Green* courts realized the problematic situation where each adjacent state's interest would outweigh the concerns of uniform

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[12] *Bonura vs. Commercial Union Ins. Co.*, 393 So.2d 1239 (La. 1981).

[13] *Gasquet vs. Commercial Union Ins. Co.*, 391 So.2d 466 (La. App. 4th Cir. 1980).

[14] *Dean vs. Lake Charles Harbor & Term. Dist.*, 496 So.2d (La. App. 3d Cir. 1986).

and pre-emptive maritime law with regard to injuries on the high seas. Congress and the federal system accommodates those workers injured on the outer continental shelf by the applicability of state law to such waters. That is not the situation here, as this is a general maritime law situation and state law conflicts with the maritime substantive law.

All of Plaintiff's cases have to contend with the one overwhelming fact, that the *Duhon* decision stands for the judicial pronouncement that 2317 is inapplicable with regard to the general maritime law. Nothing cited by Plaintiff at any level of court changes the theory upon which *Duhon* is based and upon which *Green* should stand.

So plaintiff makes an incorrect statement in saying that there is no contradictory jurisprudence which would prevent the application of 2317 in a maritime environment. *Duhon* is that contradictory jurisprudence and by the denial of writs in *Duhon* by this Supreme Court, it stands as the decision which should govern this Court's denial of Writs in this matter. The facade of suggesting that the citizens of the state have the right to protect themselves under this circumstance is not a compelling reason to change that decision. The compelling reason to maintain the present case law is the philosophy of the uniformity of maritime law as well as the theory of federal pre-emption where state law conflicts with general maritime law. The Plaintiff's authority falls short on overcoming the legal principle which should govern this circumstance.

Suffice it to say, based on the above, and the lack of support by Plaintiff or at best, misapplied case law, a maritime action in state court requires the state court to apply federal law so a single uniform body of maritime law may be created. Any conflict between the state and federal law must result in federal law preempting state law if the

state law conflicts. Any "significant state interest" must be subservient to the supremacy and dictates of federal maritime law.

Since the general maritime tort law requires proof of negligence by a passenger who sues a common carrier, Civil Code Article 2317 does not require proof of negligence, thus, there is a substantive conflict affecting the rights of the parties and the maritime law, as *Duhon* and now *Green* hold, must ultimately prevail to determine those rights.

PLAINTIFF'S ASSIGNMENT OF ERROR II

II. THE COURT OF APPEALS ERRED IN APPLYING FOREIGN LAW TO THIS DISPUTE BETWEEN LOUISIANA CITIZENS IN A LOUISIANA COURT WHERE PRE-TRIAL AND INITIAL APPEAL WERE ALL PURSUED SOLELY UNDER LOUISIANA LAW.

RESPONSE TO PLAINTIFF'S ASSIGNMENT OF ERROR II

Plaintiff mischaracterizes federal maritime law as "foreign law." The "maritime law" issue is related to the supremacy of two competing laws, with conflicting substantive remedies. This is not the same as "foreign law" and should be distinguished.

Plaintiff further mischaracterizes state control over the application of maritime law. State courts are compelled to apply federal maritime law and admiralty law when it applies regardless of state legislative concerns. Substantive law is not a choice. *Forum* is the only choice.

With regard to the Plaintiff's characterization of maritime law as "foreign law," the Code of Evidence

clearly makes a differentiation when it lists foreign law and maritime law separately. See La. Code of Evidence Rule 202 (B) (1) (f). Furthermore, all of the cases cited by Plaintiff regarding foreign law dealt with **another state's law or another country's law.** There was no question of the applicability of federal maritime law involved in those cases. Thus, they are without relevance or merit.

All parties knew they were dealing with a federal maritime claim in these proceedings and any intimation otherwise cannot be supported. Green's own petition plead for relief under other applicable federal and state law.

The facts of the *Green* case clearly suggest a traditional maritime activity and under the Louisiana Code of Evidence Article 202 a court is empowered to take judicial notice of certain legal matters.

Article 202 states under Subsection A certain requirements for mandatory judicial notice of legal matters:

> "202 A. A court, whether requested to do so or not, shall take judicial notice of the laws of the United States, of every state . . . ."

Since the federal substantive maritime law is a law of the United States, the jurisprudence interpreting the law of maritime torts simply does not allow for the application of state law under Civil Code Article 2317.

Indeed, under Comment (c), under Article 202:

> "Law" includes the common law as well as statutory law thus incorporating all judicial decisions authoritative in their respective jurisdictions, and embraces decisions that interpret or apply both the common law and statutes.

Furthermore, under Article 202 (B) (1) (f) the Code of Evidence states:

> "A court shall take judicial notice of the following ... and may take judicial notice without request of a party of . . . maritime law."

Comment (d) under that Article states "Maritime Law" refers to those principles and rules of the general maritime law that are recognized by maritime nations of the world.

If a Writ is granted and/or the *en banc* decision is reversed, Article 2317 of the Louisiana Civil Code would be a significant expansion on the actions and remedies provided by general maritime law. This is not a proper basis for recovery where there is a conflict. It would also be a reversal of the *Duhon* decision which allowed the common carrier (PHI) exemption from liability.

Michael Green now seeks to accomplish what he failed to accomplish at trial. It was his case to control. It was his burden to prove negligence. It was his burden and obligation to name the manufacturer of the helicopter's governor to prove strict products liability. He now must accept the fact that he has failed to prove his case under the applicable law.

PLAINTIFF'S ASSIGNMENT OF ERROR III

III. THE COURT OF APPEALS ERRED IN REQUIRING THAT PLAINTIFF PROVE THE NON-EXISTENCE OF EMPLOYMENT WITHIN HIS PHYSICAL CAPACITIES AT A SALARY HIGHER THAN THAT WHICH HE WAS EARNING AFTER COMPLETION OF A POST-ACCIDENT VOCATIONAL RETRAINING PROGRAM.

RESPONSE TO PLAINTIFF'S ASSIGNMENT OF ERROR III

No response is necessary at this time because no future damages are relevant if there is no liability.

PLAINTIFF'S ASSIGNMENT OF ERROR IV

IV. THE COURT OF APPEALS ERRED IN FAILING TO HOLD THAT DEFENDANT HAD WAIVED ITS APPEAL BY INVOKING THE PROCEDURE TO TERMINATE THE ACCRUAL OF LEGAL INTEREST.

RESPONSE TO PLAINTIFF'S ASSIGNMENT OF ERROR IV

In an interesting twist, Plaintiff argues that what was once moot is no longer moot. The Defendant's tender of money into the registry of the Court is still moot because the liability question, in the first instance, has been finally determined.

The issue is also moot because three separate panels of judges and/or justices have made merit determinations based on issues raised on appeal by Respondent. Thus, the Courts have, by rendering such decisions, removed any consideration of the waiver of the right to appeal.

Furthermore, Plaintiff and Intervenor are estopped from raising the issue now because in earlier briefs at the original appeal they took a decidedly different approach. They stated that the accrual of interest was not suspended by Respondent-Defendant's tender because it was an invalid tender. Now they are, by inference, contending it was a valid tender which prevented Respondent from even

appealing. Furthermore, both Plaintiff and Intervenor filed an *ex parte* order unilaterally withdrawing the deposited funds, two days before Christmas, without notice or contradictory hearing based on an order before a judge different than the Judge assigned to this case.

On the original appeal, Respondent answered the appeal. Plaintiff and Intervenor sought additional monies. There is no support in the law that Respondent-Defendant should not be allowed to defend itself.

INTERVENOR'S ASSIGNMENT OF ERROR I

I. **THE THIRD CIRCUIT INCORRECTLY DECIDED *DUHON V. PETROLEUM HELICOPTERS, INC.*, 554 SO.2D 1270 (LA. APP. 3D CIR. 1989), *WRIT DENIED* 559 SO.2D 1360 (1990) AND THE RULES OF LAW EXPRESSED THEREIN SHOULD THEREFORE NOT HAVE BEEN APPLIED TO THE CASE AT BAR.**

RESPONSE TO INTERVENOR'S ASSIGNMENT OF ERROR I

See Response to Plaintiff's Assignment of Error I.

INTERVENOR'S ASSIGNMENT OF ERROR II

II. **IF THE THIRD CIRCUIT'S EN BANC DECISION ON REMAND FROM THE LOUISIANA SUPREME COURT IS UPHELD REGARDING THE APPLICABILITY OF THE RULES OF LAW ENUNCIATED IN *DUHON V. PETROLEUM HELICOPTERS, INC.*, SUPRA, THEN THE THIRD CIRCUIT SHOULD HAVE REMANDED MICHAEL**

GREEN'S CASE TO THE TRIAL COURT FOR ADDITIONAL EVIDENTIARY HEARINGS RELATIVE TO THE FEDERAL CAUSES OF ACTION.

RESPONSE TO INTERVENOR'S ASSIGNMENT OF ERROR II

Intervenor's argument here overlooks one critical factor. Michael Green had his chance to prove negligence and the trial court found he did not succeed. The Third Circuit affirmed. The issues were again briefed and obviously considered by this Court in the Respondent's writ application of June 20, 1990. *Res judicata* prevents another attempt. The Defendant simply succeeded in repelling any negligence proof and the Plaintiff and Intervenor had their opportunity and failed. No litigant should get two bites of that apple.

Furthermore, there is nothing Plaintiff or Intervenor can do evidentiary-wise now that they did not attempt at trial. Therefore, remand for additional evidence is unnecessary.

INTERVENOR'S ASSIGNMENT OF ERROR III

III. INDUSTRIAL HELICOPTERS, INC. HAS NO STANDING TO MAINTAIN ITS ARGUMENT ON FEDERAL [PEREMPTION] PRE-EMPTION OF MARITIME LAW.

RESPONSE TO INTERVENOR'S ASSIGNMENT OF ERROR III

For the reasons submitted under the general responses to the Writ Application and Response to Plain-

tiff's Assignment of Error II, Intervenor's assignment must fail.

Additionally, the waiver of the defense is now a moot issue because at least two court panels have passed on the merits of the arguments set forth by Industrial Helicopters regarding the applicability of general maritme law. The nature of the facts and circumstances of the case dictated the applicability of federal maritime law under which Plaintiff's own petition sought relief. His failure to adequately prove his case under the laws and rights plead in his petition or the parties therein named or unnamed control this matter, not pre-emption.

Plaintiff's demands were defeated because *he failed* to prove negligence, and failed to name the manufacturer of the helicopter's governor, not because Industrial Helicopters withheld or failed to raise a new matter not covered by Plaintiff's petition. Plaintiff's petition raised the matter. The facts of the case and location of the accident raised the matter. There is no element of surprise which would support Intervenor's contentions that Respondent's failure to raise pre-emption is fatal. The theory behind the affirmative defense cases cited by Intervenor do no fit in this case. Green plead negligence, offered proof of same and INDUSTRIAL HELICOPTERS successfully exonerated itself of negligence. Therefore, remand for additional evidence is unnecessary.

The standing issue is moot because the Supreme Court granted writs and the *en banc* Third Circuit made its decision. If there was a prohibitive problem with pre-emption it would have been addressed by these courts. Their silence on the issue and determination on the merits renders the issue moot.

Furthermore, Intervenor's argument regarding ERISA pre-emption is distinguishable. The pleading of ERISA as a defense removes the application of state law penalties under L.R.S. 22:657. Conversely, the facts of the *Green* case and the pleadings filed by Green himself *invoke* the application of federal maritime law. A state remedy inconsistent with federal maritime law cannot be sustained. In the insurance issue, Defendant has option to raise federal pre-emption. Maritime law, the exclusive province of the federal system if there is a conflict with state laws, renders the pre-emption argument irrelevant because a litigant is bound by the dictates of general maritime law especially when relief is prayed for and sufficient proof is not adduced at trial. State law in conflict with federal general maritime law is not the same comparison or question as a right to diminish a state law element of damages which ERISA pre-emption provides.

Finally, Intervenor overlooks a key phrase regarding its contentions that the appeal is waived. The money was withdrawn *ex parte* and with no hearing, see Response to Plaintiff's Assignment of Error IV, *supra*. Respondent did not know of the withdrawal until after an appeal was lodged and the record transmitted to Respondent.

CONCLUSION

INDUSTRIAL HELICOPTERS, INC. contends that the Writ Application cannot be entertained because procedural mechanisms and theories already dictate that the merits of the *Green* case have been determined, and this Court has already passed on the issue.

Alternatively, the Writ should be denied because the Third Circuit has decided, once and for all, and correctly, the conflict within its circuit on this issue.

Maritime Law must be accorded its sanctity and special place when it otherwise conflicts with state law and no amount of "state interest" can overcome this circumstance.

All other pre-emption and/or waiver and/or lack of standing arguments fail of their own weight because the reviewing Courts have gotten past this point to the crux issues.

The *En Banc* decision of the Third Circuit should remain intact, reversing the trial court and exonerating Respondent-Defendant from all liability because the Plaintiff failed to produce the requisite proof to be granted the relief sought, under the substantive principles of law at issue.

Respectfully submitted,

SONNIER, HEBERT & HEBERT

BY: /s/ Charles R. Sonnier

CHARLES R. SONNIER
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BY: /s/ Fred W. Davis

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CERTIFICATE OF MAILING

BEFORE ME, the undersigned Notary, personally came and appeared CHARLES R. SONNIER, a partner in the firm of **SONNIER, HEBERT & HEBERT**, who did declare and state that the statements made herein are true and correct to the best of his knowledge, information and belief and that a copy of this Opposition to Writ Application has this day been mailed to the Supreme Court of the State of Louisiana, the Third Circuit Court of Appeals, the Honorable Judge Don Aaron, and to all counsel of record, by placing a copy of this Opposition to Writ Application in the United States Mail, postage prepaid and properly addressed.

/s/ Charles R. Sonnier
CHARLES R. SONNIER #12260

SWORN TO AND SUBSCRIBED before me, Notary, this 24th day of April, 1991.

/s/ Fred W. Davis
NOTARY PUBLIC

APPENDIX F

NO. 88-1365

COURT OF APPEAL, THIRD CIRCUIT

STATE OF LOUISIANA

MARCH 13 1991

MICHAEL J. GREEN (Intervenor) &
UNITED STATES FIDELITY & GUARANTY
COMPANY

Plaintiffs - Appellants

VERSUS

INDUSTRIAL HELICOPTERS, INC.
& DOUG WRIGHT

Defendants - Appellees

On remand from the Supreme Court of Louisiana.

EN BANC

This case was remanded to us with orders to hold an en banc hearing and determine whether the decision is in conflict with *Duhon v. Petroleum Helicopters, Inc.*, 554 So. 2d 1270 (La. App. 3d Cir. 1989), writ denied, 559 So. 2d 1360 (La. 1990), and if so, determine which view is correct.

An en banc hearing has been held. The majority of this court concludes that the decisions are in conflict. The conflict lies in the views taken by the two panels regarding

the application of the strict liability remedy of La. C.C. art. 2317, to a claim for personal injuries to a helicopter passenger, brought against the owner of the helicopter arising out of a crash at sea off the coast of Louisiana. In *Duhon*, this court found that the plaintiff could not recover from the helicopter owner, because the plaintiff had not proved that the owner was negligent, and because La. C.C. art. 2317 did not apply. In *Green*, this court found that the plaintiff had not proved that the helicopter owner was negligent, but that C.C. art. 2317 applied and the plaintiff could, therefore, recover from the helicopter owner.

The same majority also concludes that Duhon is the correct view. We do so for the same reasons we gave in *Duhon*, 554 So. 2d at 1276, as folows:

> The liability of PHI is controlled by the general maritime tort law. A helicopter ferrying passengers from shore to an artificial island is engaged in a function traditionally performed by waterborne vessels, and if it is involved in an accident on the high seas, admiralty jurisdiction is invoked. *Offshore Logistics, Inc. v. Tallentire,* 477 U.S. 207, 106 S.Ct. 2485, 91 L.Ed.2d 174 (1986). The plaintiffs here are in state court because of the "saving to suitors" clause of 28 U.S.C.A. § 1333. Plaintiffs are in state court seeking a remedy for a wrong, but if the remedy sought under state law alters or conflicts with the maritime or admiralty law which establishes the substantive rights of the parties, then the federal substantive admiralty or maritime law controls. *Hebert v. Diamond M. Co.,* 367 So.2d 1210 (La.App. 1st Cir.1978).
>
> [3] The question before us is whether the strict liability remedy of La.C.C. art. 2317 is available to the plaintiffs in this admiralty case.

We decide that it is not. Under La.C.C. art. 2317 and the jurisprudence interpreting it, legal fault is imposed on the custodian of a thing for damage caused by a defect in the thing, regardless of any personal negligence by the custodian. *King v. Louviere,* 543 So.2d 1327 (La.1989). The strict liability or legal fault that arises from La.C.C. art. 2317 is more than a rebuttable presumption of negligence. *Halphen v. Johns-Manville Sales Corp.,* 484 So.2d 110 (la.1986). The custodian cannot be absolved from his strict liability even if he proves that he did not know and could not have known of the unreasonable risk to others. *Id.* at 116.

[4] We have been unable to find anything in the general maritime tort law the same as La.C.C. art. 2317. The warranty of seaworthiness and the liability that attaches to the breach thereof may have some kindred features, but it is applicable only to seamen; there is no implied warranty of seaworthiness extended to passengers. *Complaint of Compagnie Generale Transatlantique,* 392 F.Supp. 973 (U.S.D.C., Puerto Rico, 1975). Instead, a carrier's duty when transporting passengers requires him to exercise a very high degree of care. *Moore-McCormack Lines, Inc. v. Russak,* 266 F.2d 573 (9th Cir. 1959). Merely because an accident occurs, however, a carrier does not become liable to a passenger. *Katz v. Cie Generale and Transatlantique,* 271 F.2d 590 (4th Cir. 1959). A passenger may recover personal injury damages only if he proves the fault or negligence of a carrier. *Counts v. Lafayette Crewboats, Inc.,* 622 F.Supp. 299 (W.D.La.1983).

[5] Since the general maritime tort law requires proof of negligence by a passenger who sues a common carrier, and La. C.C. art. 2317 does not require proof of negligence, there is a

substantive conflict affecting the rights of the parties, and the maritime law must prevail.

Although the remand order did not explicity require us to decide the *Green* appeal, we assume that that is now our duty as a matter of course.

The trial court found that Green and the intervenor had not proved that either Industrial Helicopters or its pilot were guilty of any negligence in the case. There is no clear error in these findings of fact.

For these reasons, the opinion and judgment rendered herein on April 18, 1990, is recalled and set aside. The judgment of the trial court is reversed, and the claims of the plaintiff and intervenor are dismissed. Plaintiff will pay three-fourths of the costs below and on appeal. Intervenor will pay one-fourth of the costs.

REVERSED.

NUMBER 88-1365

COURT OF APPEAL, THIRD CIRCUIT

MAR 13 1991

MICHAEL J. GREEN & UNITED
STATES FIDELITY & GUARANTY COMPANY

Plaintiffs - Appellants

VERSUS

INDUSTRIAL HELICOPTERS, INC.
& DOUG WRIGHT

Defendants - Appellees

STOKER, Judge, dissenting

I dissent for the reasons assigned by Laborde, J.

NUMBER 88-1365

COURT OF APPEAL, THIRD CIRCUIT

STATE OF LOUISIANA

MAR 13 1991

MICHAEL J. GREEN & UNITED STATES FIDELITY & GUARANTY COMPANY

Plaintiffs - Appellants

VERSUS

INDUSTRIAL HELICOPTERS, INC. & DOUG WRIGHT

Defendants - Appellees

On remand from the Supreme Court of Louisiana.

LABORDE, J., dissents and assigns reasons.

LABORDE, Judge, dissenting.

As I believe that this court reached the correct result in the decision reported at 560 So.2d 684 (La. App. 3d Cir. 1990), I respectfully dissent from the majority opinion.

A-74

NUMBER 88-1365

COURT OF APPEAL, THIRD CIRCUIT

STATE OF LOUISIANA

MAR 13 1991

MICHAEL J. GREEN (Intervenor) &
UNITED STATES FIDELITY
& GUARANTY COMPANY

Plaintiffs - Appellants

Versus

INDUSTRIAL HELICOPTERS, INC.
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Defendants - Appellees

On remand from the Supreme Court of Louisiana.

KNOLL, Judge, dissenting.

I respectfully dissent. In my view, plaintiff is entitled to the remedy of strict liability provided by LSA-C.C. Art. 2317; therefore, I find our earlier decision of this case correctly decided.

APPENDIX G

THE SUPREME COURT OF THE STATE OF LOUISIANA

MICHAEL J. GREEN,
UNITED STATES FIDELITY & GUARANTY CO.

VS. NO. 90-C - 1403

INDUSTRIAL HELICOPTERS INC. AND
DOUG WRIGHT

— — — — — —

IN RE: Industrial Helicopters; - Defendant(s); Applying for Writ of Certiorari and/or Review; to the Court of Appeal, Third Circuit, number CA88-1365; Parish of Lafayette 15th Judicial District Court Div."J" Number 857722

— — — — — —

October 19, 1990

Granted. The case is remanded to the Third Circuit Court of Appeal. The Third Circuit is ordered to hold an en banc hearing and determine whether this decision is in conflict with Duhon v. Petroleum Helicopters, Inc., 554 So.2d 1270 (La. App. 3rd Cir. 1989), and if so to determine which view is correct.

LFC

PFC

WFM

JLD

HTL

PH

WATSON, J., concurs in the remand and assigns reasons.

Supreme Court of Louisiana
October 19, 1990

/s/ Illegible

Clerk of Court
For the Court

SUPREME COURT OF LOUISIANA

NO. 90-C-1403

MICHAEL J. GREEN

versus

INDUSTRIAL HELICOPTERS, INC.

WATSON, Justice, Concurring in the Remand:

In my view, remand of this matter does not imply that *Duhon v. Petroleum Helicopters, Inc.*, 554 So.2d 1270 (La.App. 3rd Cir. 1989), *writ denied*, 559 So.2d 1360 (La. 1990), was corrctly decided.

When there is a death on the high seas, the Death on the High Seas Act (DOHSA) preempts any conflicting state law. *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 106 S.Ct. 2485, 91 L.Ed.2d 174 (1986). There is a distinction between a pilot, who is performing a maritime transportation function, and a platform worker/plane passenger. See *Smith v. Pan Air Corp.*, 684 F.2d 1102 (5th Cir. 1982). The federal courts do not have exclusive jurisdiction over personal injuries on the outer continental shelf. *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 101 S.Ct. 2870, 69 L.Ed.2d 784 (1981). Strict liability under Louisiana's codal law applies to injuries on the outer continental shelf off the shores of Louisiana. *Olsen v. Shell Oil Company*, 365 So.2d 1285 (La. 1978)

The instant case, *Green v. Industrial Helicopters, Inc.*, appears to have reached a correct resolution. LSA-C.C. art. 2317 applies to injuries received on the outer continental shelf off the coast of Louisiana.

I respectfully concur in the remand.